

*Appendix 20: Scoping Comments Received  
by EPA*

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## Appendix 20

### Scoping Comments Received By EPA

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**Darrel Schoelling**  
*Executive Secretary*

August 22, 1997

Richard E. Sanderson  
Director  
Office of Federal Activities  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, DC 20460

**Antarctic Conservation Act DEIS/Scoping Comments**

Dear Mr. Sanderson:

I am writing to provide these preliminary comments on behalf of the International Association of Antarctica Tour Operators (IAATO) in response to the "Notice of Intent to Prepare an Environmental Impact Statement for the Final Rule for Environmental Impact Assessment of Nongovernmental Activities in Antarctica", as published in the May 9, 1997 Federal Register (62 Fed. Reg. 25611) (NOI). The Environmental Protection Agency (EPA) is soliciting such comments according to the requirements of the National Environmental Policy Act (NEPA) and its implementing regulations (40 CFR Part 6, Subpart D; 40 CFR Part 1501). Also please find enclosed an annotated copy of the "Environmental Assessment of Proposed Interim Rules for Non-Governmental Activity in Antarctica" (EA), prepared by Science Applications International Corporation (SAIC), where John Splettstoesser has provided comments.

**Timing of Rule**

As previously outlined in the letter by Eldon V.C. Greenberg on June 27, 1997, IAATO is deeply troubled by the procedures utilized to date by EPA to carry out its responsibilities under Section 4A(c) of the Antarctic Conservation Act (the Act). We believe that the novel legal and policy issues arising out of the legal mandate of the Act, and the unusual circumstances of the promulgation of the Interim Final Rule, compel EPA to pay more attention to the timing and scope of the Rule than it has shown to date. We look forward to your full response to the questions posed by Mr. Greenberg's letter, particularly regarding EPA's interpretation of the statutory mandate of the Act and self-imposed sunset clause for the Interim Final Rule.

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**Nature of the Regulated Industry**

IAATO is a membership organization founded in 1991 to advocate, promote and practice safe and environmentally responsible private sector travel to the Antarctic. As such, IAATO and its members have gained experience operating under the requirements of the Antarctic Treaty System, including the Protocol on Environmental Protection to the Antarctic Treaty (the Protocol) and implementing legislation. This experience unfortunately was not reflected in the EA, which was intended to fulfill NEPA requirements in connection with promulgation of the Interim Final Rule.

IAATO looks forward to a thorough elaboration and analysis of current national and international requirements and self-imposed good practices by current Antarctic tour operators in the Environmental Impact Statement (EIS) on the Final Rule currently in preparation by SAIC. We find the "no action" alternative (2.2) and analysis of the environmental consequences of the no action alternative (4.1) in the EA to be deeply flawed and incomplete.

Section 4A(c)(1)(A) of the Act calls for EPA to promulgate regulations "to provide for the environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under paragraph 5 of Article VII of the Treaty." Given the small number of U.S. private operators and record of self-regulation by the Antarctic tour industry, IAATO sees a broad interpretation of this mandate as misguided with potentially serious consequences to the Antarctic environment. An unnecessarily burdensome, prescriptive rule could drive experienced Antarctic tour operators off-shore or out of business and dismantle the current flexible and proven approach to limiting impacts.

IAATO supports the interpretation of "persons required to carry out an Environmental Impact Assessment" set out in Section II.D.1 of the preamble to the Interim Final Rule. This focus on "operators," defined as a person subject to U.S. jurisdiction who "organizes" a nongovernmental expedition to Antarctica, is consistent with the interpretation of Advance Notification by the U.S. Department of State. We strongly believe that EPA has not been given oversight of international tourism to the Antarctic but rather the mandate to promulgate regulations for U.S. organizers only. Moreover, in our judgment, there is no question that the environmental assessment requirements of the Act do not extend to the actions of individual U.S. citizens who simply participate in expeditions.

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EPA has already devoted considerable resources to promulgating regulations which impact a handful of small private businesses representing a fraction of Antarctic tourism. The Interim Final Rule appears at present to impact just six mostly small and experienced companies doing business in the United States, representing 28% of the 103 commercially organized Antarctic expeditions planned in 1997-1998. IAATO asks that EPA take seriously its responsibilities under the Regulatory Flexibility Act, Executive Order 12866, and the Small Business Regulatory Enforcement Fairness Act of 1996 to ensure that the costs of regulation do not outweigh its benefits and to reduce burdens imposed on the regulated industry.

#### **Environmental Assessment: A Procedural Requirement**

IAATO looks forward to providing a transparent analysis of the potential impacts of its activities, which is our understanding of the requirements of the Protocol, Act and Interim Final Rule. In our view, EPA has not been given the mandate to promulgate a rule with substantive consequences, e.g., a rule which could effectively require that certain environmental impacts be avoided. Indeed, such an approach would be wholly inconsistent with the experience of the NEPA process, the intent of the Protocol and, therefore, the mandate of the Act. Nor do we believe that EPA has authority under the Act to pass on the adequacy of environmental documentation prepared by private parties. Rather, EPA's role is limited simply to the promulgation of rules governing environmental assessment. By the same token, contrary to the approach taken in the Interim Final Rule, we submit that EPA lacks authority under the Act, just as it lacks authority under NEPA, to require revision of environmental documentation submitted to the agency.

The further elaboration by EPA in the Final Rule of specific factors to consider in reviewing potential impacts is not warranted. The Interim Final Rule already incorporates the detailed factors contained in Article 2 and Article 3 of Annex I of the Protocol. IAATO takes the position, along with the U.S. Department of State and other agencies, that Article 3 Principles are principles which inform the entire Protocol but which were not intended to create binding legal obligations and should not be treated as such. IAATO is deeply concerned that the inclusion of this item as an issue in the NOI is an effort to turn a procedural requirement into a substantive review of potential impacts.

IAATO is deeply troubled by the ongoing focus by EPA and its contractor, SAIC, on issues that appear to be inconsistent with the substantial body of experience surrounding NEPA, as well as

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the Protocol and Act. While the purpose of the EIS is to elaborate reasonable alternatives, IAATO is puzzled by the attention to questions of substantive review, mitigation, monitoring, certification, required education and training and other issues that clearly do not pertain directly to the environmental assessment process.

IAATO believes that the potential impacts of Antarctic tourism activities can be most effectively managed through aggressive self-regulation, self-certification and guidance provided by the Scientific Committee on Antarctic Research (SCAR), Council of Managers of National Antarctic Programs (COMNAP) and other components of the Antarctic Treaty System. IAATO does not believe the environmental assessment process is intended, in and of itself, as a broad tool for maximum environmental protection. Rather, it is a planning tool that requires disclosure of environmental impacts of activities but does not dictate substantive results.

#### **Streamlining Documentation**

IAATO asks that serious consideration be given to the development of a provision parallel to the provisions of NEPA regulations allowing a categorical exclusion for certain kinds of carefully defined activities. The National Science Foundation has already established a categorical exclusion for a number of governmental activities. In particular, the model of ship-based tourism, accompanied by a thorough educational program and a qualified staff, followed to date by Antarctic tour operators, has been demonstrated in other environmentally sensitive parts of the world (e.g., the Galapagos Islands, Baja California), as well as in Antarctica itself, to have limited impact. Certainly, EPA should explore whether a categorical exclusion should be appropriate for many, if not all, such activities.

Given the international nature of Antarctic tourism and overlapping national jurisdiction, IAATO asks that EPA also give serious consideration to accepting the determination on environmental assessments by other appropriate national authorities. Domestic implementation of the Protocol by other countries includes provision for document reciprocity, thereby significantly streamlining paperwork and the regulatory burden on a small industry. It would serve no practical purpose for U.S. regulations to go beyond what is required by other national authorities. Indeed, such a rule could have serious environmental consequences, putting U.S. operators at a competitive disadvantage and encouraging operators to move their operations offshore.

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IAATO does not see the need to automatically require that operators file an environmental assessment with EPA on an annual basis. In some cases, companies have been operating at the same level of activity aboard the same vessels with the same staff for decades and, arguably, could be considered an existing activity.

IAATO sees no value in asking for a resubmission of documentation annually for these operators. A provision should be made in the Final Rule for a multi-year submission based on a projection of future activities.

The Interim Final Rule includes an additional category of documentation called a Preliminary Environmental Review Memorandum (PERM), which does not differ substantially from the information provided in accordance with paragraph 5 of Article VII of the Treaty and as elaborated in Recommendation XVIII-1 of the Antarctic Treaty System. IAATO sees no need for this category and asks that it be abandoned in the Final Rule. Detailed information on planned activities is already being provided to the State Department, which has the responsibility for distributing the information.

#### **Mitigation and Monitoring**

Annex I of the Protocol does not mandate mitigation nor does the NEPA process require mitigation. The Final Rule should not require mitigation for any activity. As provided in the Interim Final Rule, operators who choose to mitigate their activities will assess and verify the adequacy of proposed voluntary measures. The Interim Final Rule needs no further modification on this subject.

The information required by the Antarctic Treaty System and as incorporated in the Interim Final Rule regarding the scope, frequency and intensity of tourism and other nongovernmental activities in the Antarctic is sufficient to allow for a retrospective analysis of potential impact. IAATO notes that the standard Post Season Report (Final Report of the XXI ATCM, Resolution 3 (1997)) requires more information than reports filed on governmental activities. The standard report will greatly facilitate future work on the potential impact of tourism activities.

The Interim Final Rule needs no further modification in regard to monitoring. SCAR has not yet developed clear guidelines and recommendations on monitoring programs. It is not possible to create any scientifically credible monitoring regime at this time, and such a regime must be created with the advice of scientists familiar with the Antarctic. To mandate any further monitoring now would create an expensive additional

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burden on the tourism industry without any demonstrated scientific value to the results obtained.

#### **Public Comment on Environmental Documentation**

IAATO supports the approach taken in the Interim Final Rule with respect to the public availability of Initial Environmental Evaluations (IEEs), which should be retained without modification. The Protocol does not mandate public comment on IEEs, and provision has already been made in the Interim Final Rule for informal public access to any IEEs received. This seems sufficient and consistent with NEPA practice.

\* \* \*

Please do not hesitate to contact me if you have any questions about these comments or if you would like any additional information. We look forward to working closely with you as the NEPA process proceeds and participating in a second scoping session this fall.

Sincerely,

Darrel Schoeling  
Executive Secretary

Enclosure



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July 7, 1997

Mr. Richard E. Sanderson, Director  
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Dear Mr. Sanderson,

I represent the International Association of Antarctica Tour Operators (IAATO) as Spokesperson, since the founding of IAATO in 1991. Prior to that year, I was invited to join a tour ship to Antarctica as a lecturer in 1983, my first time in that capacity, although I have also worked for many summers in Antarctica as a geologist with the U.S. Antarctic Program with grant support from the National Science Foundation.

My work on tour vessels in Antarctica includes some 60 individual cruises since 1983, on a variety of ships and for several different tour operators. As a result, I have experienced a variety of cruise itineraries, operational procedures, and everything else that comes with tourist cruises in Antarctica, including operations prior to the formation of IAATO in 1991. That year is a milestone, because it represents the union of 7, and now 12, full members which are competitive and profit-driven, but nevertheless have pooled their experience and knowledge to conduct environmentally-safe tourism in Antarctica according to self-imposed standards and guidelines (prior to Treaty regulations such as Recommendation XVIII-1) and now within formal guidance procedures. In fact, they have always operated according to environmental guidelines, realizing that Antarctica is a unique part of the world, with vulnerable fauna that can easily be affected by human presence. The fact that there are six countries within the 12 members makes the co-operative aspect even more unique, but it also introduces the potential for imposing different regulations on different operators, which is clearly contrary to the intent of the Protocol.

IAATO's record of environmentally responsible private-sector travel in Antarctica has gained itself a voice in Antarctic Treaty Consultative Meetings since its formation in 1991, advising Treaty Party delegates when requested and assisting in formulating regulations that pertain to tourism.

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Given the above background as it applies to recent events such as the Environmental Protocol and EPA regulations promulgated as a result of ratification of the Protocol, I have some comments about overall content of the Interim Final Rule as it might transfer to the Final Rule. First of all, I understand the reasons for implementing the Rule, given the timing of the XXI ATCM in May 1997, but I have misgivings about putting such a document into effect without benefit of public comment by either the tour industry or other interested parties. Because of the international nature of the tour industry in Antarctica, the operators were given little time with which to formulate a consolidated response, and little time as well to prepare required paperwork for the coming Antarctic season. The latter, in particular, can have disastrous results for an operator in the event that further time is requested by EPA in order for a specific submittal to be approved. In the worst case, a cruise, or cruises, might have to be cancelled, leading to potential loss of long-standing clientele; refunding large sums of money; potential lawsuits; cancellation of ship charters and incurring related extra costs; office costs of re-booking clients, changes in air travel and accommodations; and the list goes on. In other words, the timetable for conducting business in Antarctica is unrealistic for the near future, and can result in extreme economic hardship for one or more of the operators.

On the positive side and as a means to keep things simple, I wholeheartedly agree with the statements in Section VII. **Paperwork Reduction Act**, p. 25544, right column, that "an operator may include more than one proposed expedition within one environmental document and one environmental document may also be used to address expeditions being carried out by more than one operator further reducing burden." Also, "EPA anticipates that operators will make one submittal per year for all of their expeditions for that year." Operators are already engaged in formulating a programmatic EIA for operations in the Antarctic Peninsula, the area most commonly visited. Co-operation, once again, is the key to a viable and effective industry.

Finally, in **Part 8 - Impact Assessment....., §8.5, Submission of environmental documents, (b)**, p. 25545, col. 1, I noted that EPA may waive or modify deadlines if an operator is acting in good faith and that circumstances outside the control of the operator created delays, provided that the environmental documentation fully meets deadlines under the Protocol. I am uncertain about the meaning of the "deadlines under the Protocol" as it applies to waivers, but the concept of waivers should be part of the Final Rule to provide flexibility both for EPA and for the tour operators.

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In summary, the timetable and proposed Rule would pose a hardship on tour operators of an unnecessary economic nature, possibly resulting in them leaving Antarctica or even going out of business. Because the industry is vigilant to opportunities, those voids could be replaced by large companies with big ships, with no or little Antarctic experience, dutifully complying with the Final Rule (or its equivalent for non-U.S. operators), but probably resulting in a greater impact on the Antarctic environment. The strength and continuity of IAATO could be easily eroded as the co-ordinator of tour operations, and possible disintegration of the organization. The repercussion of that outcome, considering the environmentally sound record of IAATO, could lead to serious problems in protecting the Antarctic environment according to terms of the Protocol. As a final comment, I propose a re-examination of the Final Rule in order to avoid regulations that go beyond the intent of the content of the Protocol.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Spieltstoesser". The signature is fluid and cursive, with the first name "John" being more prominent.

John Spieltstoesser  
IAATO Spokesperson



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July 16, 1997


TO: Joe Montgomery  
Katie Biggs  
Environmental Protection Agency  
Number of Pages: 3  
Fax: 202-564-0072  
RE: EPA Scoping Meeting July 8, 1997

FR: Denise Landau

Dear Joe and Katie

Attached is a copy of the comments I made at the Scoping Meeting. Thanks again for your efforts and I look forward to future co-operative efforts with EPA.

Kind regards,

  
Denise Landau

July 8, 1997: EPA Scoping, Arlington, Virginia Comments presented during the afternoon session.

Good Afternoon, My name is Denise Landau I am the Environmental Officer for Quark Expeditions and have had the pleasure of attending meetings and working with Antarctic tourism for over 8 years.

I appreciate the opportunity to speak before you today and your willingness to listen to our concerns.

Quark Expeditions operated 25 trips to Antarctica last year which includes both our sub charters and sub charters we've arranged through other IAATO companies. I have been on IAATO's executive committee for 4 years and have had the fortune of working closely with several of the Antarctic Tour Operators. Over the last several years I am impressed with the earnestness and willingness to operate under good faith by all IAATO members. As a small group of international operators we have always exceeded that which has been legally required of us.

In 1994 Quark and ANI commissioned Poles Apart to write Environmental Audits which were in depth documents assessing our operations and suggesting changes and improvements. Subsequently other companies, Zegrahm and Mountain Travel Sobek in conjunction with Quark Expeditions, Marine Expeditions, Orient Lines, Aurora Expeditions, Southern Heritage Expeditions have also completed various levels of assessments prior to it being a legal requirement.

I would like to briefly discuss the international nature of Antarctic Tourism.

Currently IAATO consists of 23 total companies representing 10 different countries. Out of that 23, 12 are Full members meaning that they operate vessels and or organize expeditions to Antarctica. All but 2 companies are from countries that have ratified the Protocol, although one of those companies constitute 40% of Antarctic Tourism. In addition there are 4 companies applying for IAATO membership, 2 of which have been members of IAATO previously. None of the vessels or air crafts proceeding to Antarctica are US owned or operated. Of the 23 companies 11 have offices in the USA.

Besides the International nature of the tour operators, so are the passengers. I counted the number of passengers for example traveling on Quark Expeditions in 96/97 vessels and during this season, we had a total of 1195 passengers who were non US and 436 passengers/staff who are US citizens.

For further information, refer to 8 years of data collected by the National Science Foundation, Nadene Kennedy and the most recent paper tabled at the Antarctic Treaty Meeting ATCM XX1 Inf paper 90 tabled by the United States.



All tour vessels operating in Antarctica are Russian, Bahamian, Liberian registry. None of the vessels are US registered.

Several of the companies have US offices which ticket passengers but the actual operations take place out of the USA. Therefore it is questionable whether or not the company is US based.

Quark Expeditions in particular works closely with various other countries. For example, our vessel the Kapitan Khlebnikov has operated on the Far Side of Antarctica, Ross Sea, Weddell Sea since 1992. We work closely with the Australian Antarctic program, Antarctica New Zealand, French and Australian Sub Antarctic. For this upcoming season and for this one vessel I have to submit 3 Environmental Impact Assessments (US, France and Australia) for the Antarctic and Sub Antarctic due to their legislative requirements. Last season 1996/97, I submitted a Preliminary Environmental Assessment for Australia and an Initial Environmental Assessment for Sweden. In the future, I would prefer to spend more of my time making sure our vessels, staff, passengers and crew comply with the regulations rather than spending time writing multiple assessments which virtually say the same in order to meet each country's expectations. I urge the EPA maintain their current stance and accept Environmental Assessments approved by other countries if at all possible.

The issue of Sub charters is also interesting and complicated. Quark charters vessels from the Russians, other IAATO companies may subcharter from us (for example Zegrahm and Aurora Expeditions sub charters from Quark. Quark also sub charters vessels from Hapag Lloyd and Marine Expeditions. The question is, where does the responsibility lie? If the regulations in the USA become too onerous than many of the companies which have international offices could possibly move out of the United States. Currently there are inconsistencies because companies operating out of the United States or in countries which have not ratified the protocol do not have the same legal requirements as companies whose countries have not or will never ratify the protocol. Non-Treaty Parties countries or countries who do not ratify will have an economic advantage over US companies. Virtually EPA has created regulations which favor non-US companies.

In the future, I recommend issuing regulations which take into account the International aspects of this business and which clearly defines responsibility by each operator in the Antarctic. Slowing down the Final Rule process is necessary in order to have effective legislation that will protect and encourage US companies to stay and comply with regulations. I can speak on behalf of the IAATO members in saying that we will continue to operate at a level which exceeds legal obligations as we have always historically done.

Thank you for the opportunity to speak to you today.

**EPA'S SCOPING MEETING ON THE ENVIRONMENTAL IMPACT  
STATEMENT FOR EPA'S RULE-MAKING ON ENVIRONMENTAL IMPACT  
ASSESSMENT FOR NON-GOVERNMENTAL ACTIVITIES IN ANTARCTICA**

**08 JULY, 1997**

Good afternoon and thank you for allowing me to speak before you today about the environmental impact assessment for non-governmental activities in Antarctica. My name is Victoria Underwood and I am Antarctic Operations Manager, Environmental Officer, Staffing Coordinator and Cruise Director for Abercrombie & Kent and Explorer Shipping Corporation who own and operate the m/s Explorer. The Explorer is a small expedition cruise ship, carrying 96 passengers. She has operated in the Antarctic continuously since 1970 -- longer than many other ships combined. My career in the Antarctic industry dates back to 1986. In 11 years of working in the industry, I have traveled to the Antarctic nearly 40 times, primarily to the Antarctic Peninsula region, but also to the Ross Sea sector. A&K / ESC has been a member of IAATO since 1992, although my involvement with the Antarctic tour industry began in the late-1980's when I co-wrote the original visitor and tour operator guidelines that were in effect prior to ATCM recommendation XVIII-1 which provided guidance for visitors and those organizing and conducting tourism to the Antarctic. Recommendation XVIII-1 took into account, and was modeled upon, the code of conduct created by the tour industry years prior. For the last two years I have also been elected to serve on IAATO's Executive Committee. As an active member of IAATO we fully support the effective implementation of the Protocol on Environmental Protection to the Antarctic Treaty.

The issue I would like to raise today is that of monitoring as the tour industry is greatly concerned about this issue. We appreciate the opportunity to raise this issue in depth at this public forum.

Of great concern to all of the users of the Antarctic -- including scientists, tourists, and others -- is the significant additional workload generated by the provisions of the Protocol in the area of environmental impact assessment. The EIA process appears to be fully integrated into the decision-making process in many countries, although the adoption of environmental impact assessment procedures in Antarctica has been slower in coming. Environmental impact evaluation has been discussed at Antarctic Treaty Consultative Meetings since the early 1970's and various codes of conduct were adopted. In 1991 the Treaty Nationals adopted the Protocol on Environmental Protection to the Antarctic Treaty. The Protocol is an amalgamation of the various environmental recommendations from the ATCM's, the 1964 Agreed Measures for the Conservation of Antarctic Flora and Fauna, and concepts developed under the Treaty framework, for instance, wording adapted from CRAMRA. As we are all aware, the Environmental Assessment procedures apply to any activity undertaken in the Antarctic Treaty area, including tourism. The obligation to carry out EIA's is set out in Article 8 of the Protocol, and the procedures in Annex I further develop the guidelines for Environmental Impact Assessment. We

haven't yet developed a body of practice in the Antarctic for what terms mean, for example, "minor or transitory."

The Protocol includes a general statement of environmental principles to guide planning, including a call for regular and effective monitoring. Annex I of the Protocol, on Environmental Impact Assessment, clarifies the distinction between assessments. Monitoring may be necessary for an Initial Environmental Evaluation. On the contrary it is clearly required for a Comprehensive Environmental Evaluation.

When considering any measures to assess and verify impacts there is a need for a realistic consideration of any limitations and difficulties that might be inherent. The Antarctic is unique. Not only is it difficult to determine base-line information, but it is next to impossible to identify activities other than your own which might have an unknown adverse impact.

Questions that may apply when considering a monitoring regime include:

- \* What are the cause and the effects of the impacts from an activity?
- \* What are the spatial and temporal extent of the impact?
- \* What is the intensity or significance of the impact?
- \* Is the activity being monitored to assess the impact? If so, what is being monitored, how and for how long will it continue?
- \* Are there baseline data against which to judge the impact? If not, can such information be obtained before the activity commences?

These are difficult questions to contend with and to date have not been answered.

As Antarctic tour ships are only operating in the Antarctic for 3 to 4 months each year, it is extremely difficult to access areas and obtain consistent data on a year-round basis. This is a reality that must be taken into consideration when considering monitoring regimes. Not only is it difficult to obtain crucial information on a dependable basis, but it is next to impossible to determine whether any changes detected are due to human impact from the tourism industry or attributable to natural variability or other human activity.

Until scientists familiar with the Antarctic environment have had an opportunity to conduct long-range studies looking at this particular issue that can create a scientifically based standard monitoring regime, we do not believe that it is appropriate for EPA to require details beyond that which is specified in section 8.4 of the Interim Rule, including contact information for the operator; the anticipated dates of departure; the estimated numbers involved; the means of conveyance; estimated length of stay; information on proposed landing sites and information concerning training of staff, supervision of

expedition members, and other measures, if any, that will be taken to avoid or minimize potential environmental impacts.

Tour operators have been supplying detailed information in a consistent fashion that enables researchers to do a retrospective analysis of impact and help to get at the different questions of cumulative impact. The tour operators have been working closely with the National Program Managers and hope that any regulations EPA puts into effect doesn't jeopardize any voluntary initiatives.

Thank you for the opportunity to speak before you today.



## ANTARCTIC AND SOUTHERN OCEAN COALITION

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Defenders of Wildlife  
Earth Island Institute  
EarthKind  
Friends of the Earth - USA  
Friends of Whales  
Greenpeace - USA  
The Humane Society of the United States  
International Fund for Animal Welfare  
Monitor Consortium  
Monitor International  
National Audubon Society  
National Parks and Conservation Association  
National Wildlife Federation  
Natural Resources Defense Council  
Ocean Alliance  
Sierra Club  
Sierra Club Legal Defense Fund  
The Wilderness Society  
World Society for Protection of Animals  
World Wildlife Fund - USA

### ISSUES TO BE ADDRESSED IN THE FINAL RULE FOR EIA OF NONGOVERNMENTAL ACTIVITIES IN ANTARCTICA, PROMULGATED UNDER P.L. 104-227, THE ANTARCTIC SCIENCE, TOURISM, AND CONSERVATION ACT OF 1996

The Antarctica Project, Greenpeace, Sierra Club, and World Wildlife Fund, on behalf of the Antarctic and Southern Ocean Coalition, welcomes the opportunity to provide comments on issues to be addressed in the EIS for the Final Rule for environmental impact assessment of nongovernmental activities in Antarctica.

The Protocol on Environmental Protection to the Antarctic Treaty represents a significant shift within the Antarctic Treaty System away from seeing Antarctica as a resource to be plundered and towards its preservation in its pristine state. The Protocol designates Antarctica as a "natural reserve, devoted to peace and science," and sets strict standards for the conduct of all activities in Antarctica. The Protocol is designed to ensure that the protection of the Antarctic environment is the paramount consideration when making decisions about whether and how an activity should proceed. The EIA process is designed to ensure that the spirit of the Protocol is considered by identifying possible environmental impacts and mitigation methods. To ensure that the EIA process for tourism and non-governmental activities faithfully implements the Protocol, the following issues must be considered in promulgation of the Final Rule:

1. **Article 3: Compliance with the Environmental Principles of Article 3** must be demonstrated in EIA, and should be incorporated into the Final Rule as a requirement.

The heart of the Protocol is Article 3. It articulates a series of environmental principles, which "shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area." The Article requires that activities take place in a manner consistent with these principles. The principles are expected to guide and shape environmental planning and decision-making for all activities in Antarctica, regardless of whether or not they are covered explicitly by the Annexes. ASOC has always held that these principles are an integral and legally-binding element of the Protocol, and should constitute a binding set of obligations for the conduct of all activities, and must be taken into account in implementing the Protocol.

In particular, Article 3 states that "the protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, shall be fundamental considerations in the planning and conduct of all

activities in the Antarctic Treaty area. To this end activities shall be planned and conducted so as to limit adverse impacts on the Antarctic environment... [including] degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance."

Further, Article 3 requires activities to be "planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the Antarctic environment," taking full account of the cumulative impacts of the activity, whether the activity will detrimentally affect any other activity in the area, whether technology and procedures are available to provide for environmentally safe operations, whether monitoring can be put in place to provide early detection of potential impact, and whether there exists the capacity to respond promptly to accidents. If there is insufficient information upon which to make an informed judgment about a proposed activity, ASOC believes that the precautionary principle must apply.

Finally, Article 3 requires that activities be modified, suspended or cancelled if they result or threaten to result in impacts upon the environment or associated ecosystems inconsistent with Article 3.

The incorporation of the Article 3 principles into the review criteria will allow an understanding of the extent to which the activity will conform with Article 3.

2. **Procedural vs. Substantive regulation:** The Final Rule should provide the authority to prevent an activity from proceeding if unacceptable impacts are identified, or require modification of the activity. Since the Protocol and its Annexes list prohibited activities, and environmental impacts that are to be avoided, in most cases preventing an activity from proceeding should not be an issue. However, there may be occasion when a permitted activity threatens to result in unacceptable impact, and there must be flexibility to require the modification, suspension or cancellation of the activity.

The purpose of EIA is to identify and mitigate as far as possible environmental impacts. This is backed up by a reading of Protocol Article 3, paragraph 2, which states that activities should be planned and conducted to LIMIT adverse impacts, the first paragraph of that Article states "the protection of the Antarctic environment...shall be fundamental considerations in the planning and conduct of all activities..." and paragraph 4 states that "activities...shall take place in a manner CONSISTENT WITH THE PRINCIPLES in this Article; and be modified, suspended or cancelled if they result or threaten to result in impacts upon the Antarctic environment."

The Protocol is designed to ensure that the protection of the Antarctic environment is the paramount consideration when making decisions about whether and how an activity should proceed. Further, the EIA process is designed to ensure that the spirit of the Protocol is considered.

The Protocol's EIA procedures are based on our NEPA procedures. However, whereas domestic caselaw indicates that NEPA is procedural, in the sense that it does not impose

(by itself) substantive environmental requirements, the Protocol is both procedural and substantive. It is substantive in two ways: (1) by explicitly prohibiting certain activities and requiring permits for others, and (2) by providing in Article 3 basic principles to guide environmental planning. In addition, the NEPA process is "intended to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore and enhance the environment" (NEPA Regulations, CEO, July 1, 1986, p. 3). Accordingly, "the primary purpose of an EIS is to...insure that the policies and goals defined in the Act [i.e., to protect, restore and enhance the environment] are infused into the ongoing programs and actions of the Federal Government (p. 10)." Therefore, implementation of NEPA is supposed to ensure that, when activities are undertaken, its (NEPA's) intent to protect the environment is upheld.

There is international precedent for basing modification, suspension or cancellation of an activity on the conclusions of EIA. Cf. the implementing legislation of Australia (s. 12N)2, and Norway (s. 12). The Netherlands (s. 19 & 20), Sweden (s. 19 & 20) and UK (Regulations s.10(4)(d)) have a similar requirement; however, a permit is also required for all Antarctic activities. In some countries which require a permit for all Antarctic activities, issuance of a permit is dependant on the conclusions of EIA (e.g., Germany, Finland).

**3. Definition of Operator:** The current draft Final Rule applies only to "nongovernmental expeditions to and within Antarctica organized in or proceeding from" the United States. s 8.2(b). An "operator" is defined as "any person or persons organizing a nongovernmental expedition to or within Antarctica." s 8.3(11). It has been suggested that the Final Rule should be applied only to tour operators incorporated in the United States.

Such an interpretation would be directly contrary to the language of the Antarctic Science, Tourism, and Conservation Act of 1996 (ASTCA). Congress specifically directed that it was unlawful for "any person who organizes, sponsors, operates or promotes a non-governmental expedition to Antarctica, and who does business in the United States" to fail to take steps to ensure compliance with the Protocol. ASTCA, s 4(a)(6). At a minimum, this means that the EIA provisions of section 4a of the Act should be applied to nongovernmental expeditions which, even though based outside of the United States, advertize and promote participation by U.S. citizens, accept booking here, and otherwise "do business in the United States."

"Doing business in the United States" is a legal term-of-art used elsewhere in the U.S. code. See, e.g., 8 USC 1375(e)(1)(A) (mail order brides); 15 USC 16a (antitrust laws); 26 USC 842 & 4371 (taxation of foreign insurance premiums); 31 USC 5314(a) (reporting foreign financial transactions). Courts have construed this language to mean that if a person or entity is doing business in the United States to justify the exercise of personal jurisdiction, then it is covered. A number of courts have held that continuous and systematic advertizing and promotion of foreign tours and cruises, as well as the acceptance of booking through U.S. travel agents, constitutes "doing business in the United States."

This interpretation is the only permissible one allowed by Congress in the ASTCA. Indeed, the draft Final rule seems to acknowledge this when it defines "person" as any individual or entity "subject to the jurisdiction of the United States." See s 8.3(12).

Any other interpretation would open a cavernous loophole in the application of the Final Rule. An entity, despite doing substantial business in the U.S. (and recall that at least one-third of all Antarctic tourists are Americans), could avoid regulation simply by incorporating elsewhere, perhaps even in a non-ATCP country. If this occurred, it would be impossible to enforce the explicit provisions of section 4(a)(6) of the ASTCA.

In such a case, the only alternative would be to require every U.S. citizen to acquire a permit before travelling to the Antarctic, and thus certifying directly that the provisions of section 4(a)(6) have been satisfied. ASOC asserts that EPA has the authority, like the National Park Service, to regulate entry by any U.S. citizen into Antarctica to ensure compliance with the Protocol's EIA provisions (see *National Park Service Organic Act, 16 U.S.C. 1 et seq* (1988) which states the purpose of the National Park Service is to conserve national parks [and etc.] "...by such means as will leave them unimpaired for the enjoyment of future generations."; *Wilderness Act of 1964, 16 U.S.C. 1131 et seq* (1988) which states that Wilderness Areas are to be administered "...in such manner as will leave them unimpaired for future use and enjoyment as wilderness, so as to provide for the...preservation of their wilderness character....")

There is also some international precedent for this in view of the Swedish legislation that became effective on April 1, 1994. This law required all Swedish tourists to have permits (see section 16). Indeed, every such permit application by every tourist was required to contain an environmental impact assessment (section 18(1)). Germany and Finland have similar permit requirements.

This alternative would be unnecessary if the Final Rule were applied to all tour operators who did substantial business in the United States. The regulations could provide a threshold for such a status, perhaps if (in any one year) U.S. citizens constituted a quarter or more of the participants for a particular tour.

**4. Notice and reporting:** Protocol Annex I Article 2 requires that an IEE or CEE contain sufficient detail to assess whether a proposed activity could have an impact. Notification should include, at a minimum, details on passenger numbers, vessel type, all locations and sites to be visited and planned dates of visits. It is necessary to include as much detail as possible about an expedition for the following reasons: it is only in the details that outright violations of the Protocol would be disclosed and potential impacts can get teased out, and alternative actions or mitigation proposed, it is the only way to allow consideration of cumulative impacts, and it provides a record of activity which can be used in the future to determine possible causes of (e.g., environmental, biological) change. The point of EIA is to identify potential impact, predict their likelihood and magnitude, identify alternative actions and mitigation measures, and ultimately to make an informed decision about whether and how to proceed. Although this may be arduous at first, it will become simpler and routine as experience is gained.

**5. Environmental thresholds and impact characterization, mitigation and monitoring:** Impact thresholds need to be decided on a case by case basis (at least until a body of knowledge is built up). Disclosing all possible impacts/risks is the only way to determine if an activity needs to be altered, or if a potential impact can be mitigated. The Protocol requires that monitoring be put in place to assess and verify impacts, regardless of impact threshold, and to assess the success of mitigative measures.

Thus, the Final Rule should include a requirement to identify mitigation measures, as required by Protocol Annex I, Article 3(2)(g) which requires that a CEE include "identification of measures, including monitoring programmes, that could be taken to minimise or mitigate impacts of the proposed activity...". Mitigation measures could include: control areas and "no-go" areas (e.g., prohibition of visits to colonies during sensitive times in the breeding cycle); limits on group size per expedition leader and on the number of groups at a site at a single time; limits on total number of visits to a site in a single day; avoiding having more than one ship at a site at one time; prohibition of visits to new sites; and education of expedition leaders, passengers and staff.

The Final Rule should also require identification and, as appropriate, implementation, of monitoring programs, as required by Protocol Article 3(d), and Annex I Article 2(2), Article 3(2)(g) and Article 5.

Monitoring to allow assessment of impacts, verify predicted impacts and to facilitate early detection of unforeseen effects of activities both within and outside of Antarctica is required by the Protocol and should be required in the Final Rule. With respect to appropriate monitoring regimes: the Treaty Parties are working to identify monitoring approaches that can best support the Protocol's implementation. At present, the Interim Rule requires that operators report on their present and future activities as well as provide a description of mitigative actions undertaken. Given that there is no monitoring protocol in place within the ATS, we agree that the Final Rule should continue the requirements of the Interim Rule with the proviso that once additional information becomes available, it can be incorporated into the Final Rule.

**6. Timing and distribution of documents:** EIA needs to be done sufficiently ahead of a planned expedition to allow for agency and public comment. The Protocol requires circulation of CEEs to Parties and the CEP 120 days prior to an ATCM, at which meeting it may be discussed. Although the Protocol does not require the circulation of IEEs, if the goal is to produce the best possible document, there is utility in having it reviewed widely. Given the years of experience of most Antarctic tour operators, it is reasonable to expect that they can make assumptions based on past experience concerning passenger numbers, vessels, sites, timing of visits. If the EIA is based on the broadest assumptions—e.g., maximum possible passengers, probable timing of visits, and lists all potential sites, then deviations in actual itineraries would be covered without too much difficulty.

**7. Enforcement and penalties:** Penalties are appropriate only where there is the intent to violate the regulations, especially if an operator has a history of infractions. The most important aspect at present is that an operator complies with the EIA

procedures, attempts to identify possible impacts, and puts in place mitigation and response actions. If an accident occurs despite this planning, the operator should have the capacity to respond (mitigation measures, insurance), but should not necessarily be penalized.

**8. Parity vs. non-parity regarding international regulations:** Although there is the concern that if the US regulations are too strict or burdensome the tour operators will move their business to a country that is less strict or has no regulations, this is not a reason to legislate weak requirements. (In fact, cf. implementing legislation and regulations of Australia and New Zealand, which require authorization of activities before they may proceed; s. 12F, J, L and N(3), and s. 10(3) and 12(3) respectively, and of UK which requires a permit for British expeditions to Antarctica; a British expedition includes all expeditions which depart from British territory; s. 3(3) and which requires a permit for activities requiring completion of a CEE; Regulations s.6(6).) We believe that the best way to ensure that this does not happen is to ensure that US citizens are regulated even if the operators are not (cf 3. above).

**9. Simple vs. cumulative impacts/scientific knowledge:** At present, the understanding of cumulative impacts is minimal both inside and outside the Antarctic Treaty System. Nations are beginning to design programs which will give a better understanding of what cumulative impacts mean in terms of environmental management in the Antarctic. IUCN's workshop on Cumulative Impacts in the Antarctic produced recommendations that should help Antarctic operators include consideration of cumulative impacts in their EIAs. For the present, operators should attempt to assess cumulative impacts as far as they are able. As the body of knowledge grows, this additional information should be included in EIAs. This holds as well for other areas of impact assessment where understanding of impacts is minimal, especially as there is not much baseline data with which to compare present states.

**10. Heuristic vs. deterministic evaluation criteria and assessment methods:** Impacts must be assessed on a case by case or site by site basis. For all potential impacts, the key factors usually are where the site (rookery etc) is located, who the visitors are and how they are behaving, the environmental conditions, biological conditions (chicks/eggs present), and if there are or recently were other activities taking place at or near the site. The determination of an impact threshold (e.g., the "acceptable" number of annual visitors to a rookery), must be based on rigorous research, which is subjected to broad scientific review up to the standard of peer reviewed scientific journals. Until such determination is made, the precautionary principle must apply, i.e., visitation should not be increased unless and until there is sufficient information to determine acceptable visitation levels. Impact thresholds should be regularly reviewed as new information becomes available.

**11. Streamlining documentation:** We are supportive of minimizing the paperwork burden on tour operators; however, we believe it would be risky to automatically assume that satisfactory completion of EIA for another country would be sufficient to meet the EIA requirements of this Rule. Thus, operators should be encouraged to provide copies of EIA submissions made to other governments (with translations, if need be) and

incorporate them by reference. But completion of these documents should not prejudice consideration by EPA. In addition, ASOC supports the undertaking of a "programmatic EIA" to be conducted for similar activities within a specified region. This will decrease the paperwork burden and, more importantly, will allow an assessment of cumulative impacts. In order to be truly useful, this "programmatic EIA" must take account of all other activities occurring in the area.

**12. The role of the private sector risk distribution mechanisms:** We believe that commercial instruments such as insurance and performance bonding are useful in implementing the Final Rule. These would require operators to demonstrate compliance with Protocol standards (eg vessel standards) in order to obtain insurance. Performance bonds could work the same way to ensure that expedition procedures are designed to minimize risk to the environment, and stipulated mitigation measures are carried out. Another method for minimizing risk/impact which we would support is requiring certification of expedition leaders, as this would better ensure an awareness and implementation of ATS and Protocol obligations.

**13. Transparency:** Broad public review of all IEEs and CEEs is very important as it is the only way to begin to build a body of common knowledge, and to ensure a quality document. Availability of IEEs should be advertised in the Federal Register and/or on EPA's Web site, and the public should have a minimum of 30 days to provide comments.

**14. Change in an activity:** The Protocol Article 8 requires that the EIA procedures apply to any change in an activity, whether the change arises from an increase or decrease in the intensity of the activity, from the addition of an activity, the decommissioning of a facility, etc. Thus, if there is a significant increase or decrease in the number of tourists planning on traveling to the Antarctic, a new EIA must be prepared. The tour operators are predicting a doubling in the number of tourists within five years. If this holds true, a case could be made that a CEE would be the appropriate level of impact assessment for this period. With respect to the proposed "programmatic EIA" for ship-borne Antarctic Peninsula activities of IAATO members, if this assessment is conducted for multiple years, it would need to be reviewed annually and modified if activities significantly increase or decrease.

**15. Application of Annex I:** Because paragraph 1 of Annex I refers to assessing the environmental impacts of "proposed" activities, there is the implication that EIA is not needed for existing activities (e.g., established bases, structures, runways, etc.) unless the level of activity changes. However, this "exemption" should not be construed to cover "ongoing" activities (e.g., tourism, scientific research projects), which, although they occur annually, are not continuous and are modified annually.

**16. Decision to proceed:** The scientific or other benefits of an activity must be weighed against the possible environmental impacts when deciding whether or not to proceed with the activity. If it is ultimately decided that despite an impact, the activity outweighs the environmental impact, this must be documented. This way there is the assurance that the decision to proceed was deliberative not capricious.

## Conclusion

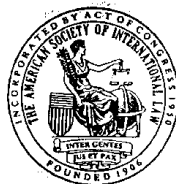
The Antarctic Environmental Protocol is a landmark agreement designed to provide comprehensive protection of the world's last great wilderness. Faithful implementation of the Protocol will ensure that the values of Antarctica, as envisioned by the original signers of the Antarctic Treaty, will be strengthened and preserved. Therefore, regulations designed to implement the Protocol's provisions must ensure that the spirit as well as the substance of the Protocol are realized in the conduct of all activities. To achieve this the Final Rule for EIA for nongovernmental activities should:

1. require compliance with the Environmental Principles of Article 3;
2. provide the authority to prevent an activity from proceeding if unacceptable impacts are identified, or require modification of the activity;
3. require the identification and mitigation of possible environmental impacts;
4. apply equally to and reach all U.S. citizens;
5. apply to all tour operators which do business in the U.S.;
6. require sufficient detail within EIA to allow informed judgments about proposed activities;
7. require identification and implementation of monitoring programs;
8. allow for a transparent process by facilitating broad public review of all IEEs and CEEs;
9. require the identification and impact assessment of alternative actions, including the alternative of not proceeding;
10. require the identification of all potential impacts, and their probability of occurring;
11. allow for flexibility to require the incorporation of new information (e.g., on cumulative impact assessment, monitoring programs) as it becomes available;
12. require documentation which explains why the least impacting alternative is not the preferred alternative; and
13. give preference to the precautionary principle when there is insufficient information upon which to make a sound judgment about a proposed activity.

prepared by  
Beth Clark, Director  
The Antarctica Project

## DOCUMENT HIGHLIGHTS:

Antarctic Treaty Measures  
Arab League Summit Communiqué  
Canada-U.S. Softwood Lumber Agreement  
European Convention on Insolvency  
Proceedings  
Financial Action Task Force  
Recommendations on Money Laundering  
OAS Inter-American Juridical Committee  
Opinion Examining U.S. Helms-Burton Act  
Pan American Federation Law on Production  
Sharing Agreements  
U.S. Iran and Libya Sanctions Act



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# International Legal Materials



NEWSLETTER

ASIL INTEREST GROUP ON  
ANTARCTICA

NOVEMBER 1995

### MESSAGE FROM THE CHAIR

The ASIL Interest Group on Antarctica encourages studies of the implementation of the Protocol on Environmental Protection.

The Conclusion of the Madrid Protocol on Environmental Protection marks the start of a new phase in the joint management of Antarctica. Not only does it bring together strands of regulation that have been developing separately over the years, the Protocol and its annexes incorporate several innovative features.

How and to what extent the Antarctic Treaty states implement the Protocol and Annexes will largely determine the shape of Antarctic governance in coming years. In addition, Antarctic experience will provide useful lessons for efforts to incorporate greater environmental sensitivity into governance structures in other parts of the world.

These considerations motivated the American Society of International Law Interest Group on Antarctica to propose comparative studies of national efforts to implement the Protocol. We hope this outline will help inspire such studies and that this newsletter will serve as a vehicle for wider dissemination of their results. The Interest Group long has enjoyed a transnational membership, and we welcome contributions from researchers in all parts of the world.

M.J. Peterson

### ANALYZING RESPONSES TO THE ANTARCTIC ENVIRONMENTAL PROTOCOL\*

The Madrid Protocol on Environmental Protection to the Antarctic Treaty presents unusual and important opportunities for contributions to the understanding of international regimes for environmental protection. Accordingly, the American Society of International Law Interest Group on Antarctica encourages timely research on:

- The Protocol itself;
- Interim and transitional international and national measures and procedures pending the Protocol's entry into force;
- International and national implementation measures and procedures;
- Relationships of interim and implementation measures and procedures to national and international law already in effect;
- Enforcement and efficacy;
- Related theoretical issues.

\*This set of suggestions for cooperative research on implementation of Antarctic environmental protection was adopted at the April 1995 meeting of the Interest Group on Antarctica. It was prepared by Professor M.J. Peterson (University of Massachusetts-Amherst), and Gerald S. Schatz, Esq. (District of Columbia and Pennsylvania Bars), Vice Chair, on the basis of other members' comments on earlier drafts at the Group's 1994 and 1995 meetings. Dr. Ethel R. Theis, of Washington, DC, assisted Schatz in preparation of the checklist.





OFFICE OF THE  
GENERAL COUNSEL

Ms. B. Katherine Biggs  
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Washington, D.C. 20460

NATIONAL SCIENCE FOUNDATION

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May 29, 1997

Dear Ms. Biggs:

As requested at our recent working group meeting, NSF is providing comments on the scoping issues contained in the Notice of Intent (NOI) for the EIS for the Final Rule for Environmental Impact Assessment of Nongovernmental Activities in Antarctica. The NOI raises ten specific issues which EPA plans to consider. We address these below and raise one additional issue.

(1) Do the time frames of the Interim Final Rule for the submittal and review of environmental documentation need to be changed?

The interim rule currently provides EPA with flexibility to waive specific deadlines under appropriate circumstances. We believe that the final rule should retain these provisions.

(2) Should EPA's review criteria more explicitly identify factors to assess in determining the environmental impact of proposed actions?

This item then goes on to discuss whether Article 3 principles can or should be more fully integrated into the review criteria. As we have stated repeatedly, in negotiating the Protocol, the United States agreed that the Article 3 principles were not mandatory or enforceable obligations and that the specific obligations of the Parties with respect to environmental impact assessments are set forth in Annex I. During the interagency process for drafting implementing legislation, all parties agreed that the Article 3 principles would not be requirements for the implementation of Annex I or Article 8. The environmental groups and all Federal agencies understood this when they endorsed the implementing legislation and agreed that Article 3 principles would not be legally enforceable obligations. For these reasons, NSF objects to framing the discussion of review criteria in terms of Article 3 principles. This is totally inconsistent with previous agreements among the agencies and the U.S. understanding of its Treaty obligations. It also is beyond the scope of EPA's or any other agency's authority and outside the scope of the legislation.

The interim regulations already reference the Article 3 principles in several sections. For example, section 8.4 incorporates details from Article 3 that an operator should consider in preparing environmental documentation. Because the interim regulations and Annex I already contain very detailed and specific criteria to be considered by the operator, no additional detail is required nor is further clarification needed. Any further incorporation of Article 3 principles would not be helpful in clarifying the process for the operators. It would also turn the Article 3 principles into binding legal obligations and would transform the EIA process from a procedural process into a substantive process, wholly inconsistent with the intent of the Protocol, the implementing legislation, and NEPA.

(3) What is the appropriate monitoring regime, if any, that should be set out for various types of nongovernmental expeditions?

In considering any monitoring regime, we must be realistic about the limitations and difficulties inherent in any monitoring conducted in Antarctica. As our Polar Biology Program Manager explained, it is extremely difficult to access areas within Antarctica on a routine, year-round and dependable basis. This reality limits the type of information that could be required as part of any monitoring program. In addition, it severely impedes the ability to ascertain whether any changes detected are attributable to natural variability or human impact. In the development of any monitoring regime, it is imperative to seek the input of scientists familiar with the Antarctic. At this point in time, with the uncertainty in the ability to create any scientifically based standard monitoring regime, we do not believe that it is appropriate to require any more than the information currently required by §8.4 of the interim rule, which includes numbers of persons ashore, information on landing sites, and information on training of staff and supervision of persons ashore.

(4) Are there other options for streamlining the documentation requirements?

We recommend including categorical exclusions for activities that have negligible impacts. In addition, tour operators may find themselves in the position of having to prepare multiple environmental impact assessment documents for the same activity to meet the varied format requirements of the different Parties to the Protocol. We recommend the regulation allow for adoption by reference or some certification procedure that would avoid the preparation of duplicate assessments. The scoping discussion should also include consideration of EPA giving full recognition to approval of an EIA by another Treaty Party. We favor providing the tour operators with the choice of preparing programmatic environmental documents which could cover several operators or multiple seasons on an area wide basis. We also support the use of these documents as a basis for tiering. The

EIS which EPA prepares for the final rule should also be used for tiering -- this could be a very efficient use of resources resulting in a decreased work load for the operator and EPA.

(5) What mitigation options should be considered as part of the EIA process? Should mitigation be required for certain activities?

Annex I of the Protocol does not mandate mitigation. The final rule should not require mitigation for any particular activity. However, if an operator chooses to mitigate and the mitigation reduces the impact from more than minor or transitory to minor or transitory, they should be required to follow through with the proposed mitigation or prepare a CEE. The interim rule already requires this and needs no further modification.

(6) What is the best way to address cumulative impacts?

This remains a difficult and contentious issue. The scientific community continues to struggle with finding answers to this question.

(7) Are there activities or categories of activities that can be excluded from the environmental documentation requirements?

As we stated above, we favor providing for categorical exclusions. NSF has categorical exclusions in its regulation so this would achieve uniformity of approach.

(8) Should there be provision for public comment on IEEs?

We believe that the approach taken in the interim regulation is sufficient and should be retained in the final rule. No further requirement for public comment on IEEs should be created. NSF has previously opposed a public notice and comment requirement for IEEs. Neither the Protocol, the implementing legislation, nor NEPA require public notice or comment on IEEs. The preamble to the interim rule states that EPA will, as a matter of practice, publish notice of receipt of an IEE on EPA's World Wide Web Site. As we have stated previously, we have no objection to this as a matter of practice but do not agree that it should be a regulatory requirement.

(9) With regard to the review of environmental documents received from other Parties, should the process as delineated in the Interim Rule be modified?


The procedures outlined in the interim rule are sufficient and adequate for both public information purposes and Treaty obligations and do not need to be modified.

(10) Do the paperwork projections in the Interim Final Rule accurately reflect the reporting requirements for those subject to the Final Rule?

This is a question that must be addressed by those affected by the rule, based on their experience to date with preparing environmental impact assessments. Based upon our experience, the 120 hours of effort per respondent is probably an understatement of the actual time required, particularly for the first IEE prepared under these new regulations.

One additional issue that should be addressed is whether or not the regulations should equate more than "minor or transitory" with "significant". We favor explicitly equating the two in the regulation. This would harmonize the U.S. governmental and nongovernmental assessments because the ASTCA specifically states that the term "significantly affecting the quality of the human environment" shall have the same meaning as the term "more than minor or transitory" for governmental activities.

Sincerely,

  
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Darrel Schoeling  
Executive Secretary

Ms Katherine Biggs  
Mr Joseph Montgomery  
July 30, 1998  
Page Two

July 30, 1998

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Implementation of the Antarctic Conservation Act

*Katie + Joe*  
Dear Ms. Biggs and Mr. Montgomery,

IAATO is pleased to provide written comment, following the second public scoping meeting on July 14, 1998. Presentations were made by eight individuals representing IAATO and U.S. Antarctic operators: Abercrombie & Kent, Clipper Cruise Line, Orient Lines, Quark Expeditions, Society Expeditions, Special Expeditions, and Zegrahm Expeditions.

Much of the comment was aimed at streamlining of documentation requirements, which Beth Clark Marks, representing the Antarctic Project, supported in her response at the end of the meeting. Many speakers emphasized the international, cooperative nature of Antarctic tourism. Our counsel Buzz Bailey (Garvey, Schubert & Barer), underscored that reciprocity was a foundation of international treaties and that it would not be unusual for the EPA to recognize authorization by other appropriate national authorities in the promulgation of the Final Rule for environmental impact assessment of nongovernmental activities in Antarctica. This was a significant concern expressed by many at the scoping meeting.

After I introduced a number of issues, Denise Landau (Quark Expeditions, Zegrahm) spoke of some of the difficulties in providing advance notification and environmental documentation on activities sponsored by several operators. She gave specific examples of difficulties already encountered. Deborah Natansohn (Orient Line) in her capacity as an executive of the Cruise Line Association of America spoke of the basic rights of Freedom of Travel and Freedom of the Seas and the danger that EPA may in its zeal infringe on these fundamental rights. Victoria Underwood (Abercrombie & Kent) documented the nature of Antarctic tourism, where many of the same activities by the same operators continue year-after-year at approximately the same level with the same ships and same staff, arguing for multi-year documents. Naomi Morse (Clipper) emphasized that the EPA should use the flexibility granted it by Congress to put into place the most cost-effective and efficient rule that avoids duplication of efforts and paperwork. John Tillotson (Society Expeditions) described the model for choosing and managing Antarctic visitor sites, emphasizing current good practices that include systematic data collection and regular exchange of environmental information. He pointed out the value of cooperation and aggressive self-regulation in protecting the Antarctic environment as demonstrated by the work of IAATO. Tom Ritchie (Special Expeditions) noted the great opportunity presented by IAATO members as a group of committed, environmentally responsible and self-governing companies that are organized and responsive.

Thank you for your careful consideration of these comments and other concerns expressed by Antarctic tour operators. As secretary of IAATO, I continue to be struck by the dedication and experience of members and their commitment to safe and environmentally responsible private sector travel to Antarctica.

Sincerely,

*Darrel Schoeling*

My name is Darrel Schoeling, secretary of the International Association of Antarctica Tour Operators, and I am speaking today on behalf of the Association. IAATO is encouraged by some recent actions of the EPA, particularly the extension of the Interim Final Rule (as published in the Federal Register April 15, 1998) and the scheduling of this second opportunity to provide public comment.

Represented today are all U.S. Antarctic tour operators with the exception of IAATO charter member, Mountain Travel Sobek, whose president Richard Weiss sends his regrets. He had planned to be here but had to cancel at the last moment. We appreciate the scheduling of this meeting in conjunction with the 10<sup>th</sup> annual meeting of the National Science Foundation and Antarctic tour operators.

IAATO suggested in its letter of June 27, 1997 to Richard Sanderson that comments "would be more meaningful if they reflect the real, practical issues encountered in the assessment process." That is what we will report today. Many of the comments you will hear echo our letter of August 25, 1997, provided in response to the "Notice of Intent to Prepare an Environmental Impact Assessment for the Final Rule for Environmental Impact Assessment of Nongovernmental Activities in Antarctica." We encourage the EPA to refer to this letter and to take it seriously in the elaboration of the Final Rule.

It has been repeatedly suggested to us that the primary value of the EIA process is as an effective planning tool and, in fact, that turned out to be true. It has led us to think systematically about our Antarctic activities and to document potential impacts. The process has also made it clear what EIA is NOT. It:

- Does NOT provide for comprehensive protection of the Antarctic Environment;
- CANNOT cover all Antarctic tourism, just that of US organizers; and
- Is NOT a management plan or guide to management for individual sites.

As indicated in our letter of August 25, 1997 -- and also in the June 22, 1998 letter by Eldon Greenberg in response to the "Information Collection Request" -- we see a number of areas where EPA can improve upon the Interim Rule. We support, in general, the approach of the Interim Rule -- and our comments today are in the interest of improving upon it, especially with regard to streamlining of documentation and recognition of voluntary measures.

These issues include:

- Provision for multi-year filing. There is no automatic need for annual documentation;
- Allowance for a "categorical exclusion" of certain types of activities such as Antarctic activities organized along a carefully defined "Lindblad Model;"
- Elimination of the category "PERM" and requirement for "updates" since it duplicates "Advance Notification;"

And, most significantly:

- the allowance for reciprocity with other appropriate national authorities so that the same activity by the same operator will not require redundant and time-consuming engagement with multiple authorities.

US-based Antarctic tour operators are a small group of well-organized and responsive companies that are in the business of environmental education. We take our responsibilities in the Antarctic seriously -- and trust that the EPA will take advantage of the opportunity to work with private industry to protect the Antarctic environment in promulgation of the Final Rule. Thank you for consideration of these comments.

## EPA Scoping Meeting on the Final Rule, July 1998

### Implementation of the Antarctic Conservation Act

Good Afternoon, My name is Denise Landau and I'm here representing and speaking for US based tour operators: Quark Expeditions, Clipper Cruise Line and Zegrahm Expeditions. I would like to discuss the international nature of Antarctic Tourism relative to ship operating companies and the submission of EIAs.

#### Overview of Antarctic Tourism

IAATO consists of:

- 28 member companies from 10 countries.
- 15 out of the 15 ships are operated by IAATO member companies
- One Land Based operator ANI, 1 Yacht Operator and the rest are ship operators
- 9 of the 28 are Full or Provisional Members of IAATO are the primary ship operators.
- Of that 9, there are 5 members (representing 8 out of the 14 vessels who are US
- In addition there are two full member companies who charter vessels from one of the nine ship operators.

#### Who is the Organizer?

IAATO members subcharter ships from each other, which can often cause confusion as to who the actual "organizer" is of the voyage. This is an important consideration should any one nation put into place unusually stringent laws and obligations. For example

- Quark Expeditions will operate the Kapitan Khlebnikov, Vavilov, Multanovskiy, and Molchanov. In addition Quark will subcharter 3 departures from Clipper Cruise Line on board the Clipper Adventurer.
- Zegrahm Expeditions also will subcharter this upcoming season the Clipper Adventurer.
- Clipper Cruise Line operates the vessel the Clipper Adventurer.
- Australian based Aurora Expeditions subcharters from Quark Expeditions the Kapitan Khlebnikov and the Molchanov.
- Quark and Zegrahm subcharter from Clipper Cruise Line

These examples demonstrate that tour operators have a choice of which national authority to provide Advance Notification – and it is not always clear who would be the most appropriate. The "organizer" of any particular voyages can be confusing. Subcharterers

can and do sometimes provide their own staff and are responsible for adherence to IAATO guidelines, relevant national legislation, Treaty Recommendation XV111-1 etc.

As you can see from the above interrelationships, Antarctic tourism is a complicated industry which has succeeded due to the voluntary spirit within the industry and the willingness to self regulate.

On behalf of Zegrahm Expeditions, Werner Zehnder would like to emphasize the point he made last year that he could become Zimbabwe company and charter a ship with Pakistani Crew and Egyptian staff. None of these countries are currently either Consultative or Non-Consultative parties to the Antarctica or Treaty or perhaps interested in ratifying the protocol.

At present, tour operators find themselves in the arduous position of having to submit multiple environmental impact assessment documents for the same activity to comply with varied format requirements of the treaty parties. Duplication should be minimized wherever possible and reciprocal agreements put into place.

#### Reciprocity

Even if an authority will accept the same document, the schedule for submission may be different and regardless it still requires understanding and following the procedures of more than one government office. The comments received from the various national authorities can also be conflicting.

- NZ based Heritage Cruise Lines submits IEE's to New Zealand. If a US company subcharters the Shokalski and the Shokalski's IEE and operation meets the obligations of NZ it would be optimal that EPA would accept the IEE written by a NZ company for the US subcharter. This would both reduce unnecessary paper work and duplication of effort
- Hapag Lloyd is required to submit an EIA to the German government. If a US company subcharters from Hapag Lloyd, the US company would have to rewrite the environmental assessment to German standards.
- Australian companies submit Environmental Impact Assessments, however under Australian legislation, the PEA's are acceptable for most tourism activities.
- Australian based company Aurora Expeditions and two US companies, Quark and Zegrahm Expeditions submitted a JOINT IEE to both the US and to Australia during the 1997/98 operating season.
- Currently Canada has no EIA requirements. Two companies operating trips to Antarctica are not required to submit EIA's. Marine Expeditions present today, however has participated fully in the writing and planning process of the US based

Programmatic IEE and voluntarily, operates their business as if Canada has ratified the Protocol.

- Canadian based Adventure Network International, land based tourism works closely with the UK Foreign Office and this year will submit their IEE to the U.K and apply for a permit to operate in Antarctica through the U.K. Again, this is voluntary on behalf of MEI and ANI and proves how responsible these operators can be despite being located in a country that has not ratified the protocol.

#### Various National Obligations

##### **Sweden**

Legislation in Sweden requires that each citizen be issued a permit when traveling to Antarctica, however Sweden has agreed that if a Swedish citizen is traveling to Antarctica with a company who has fulfilled the obligations of the country of which the operator is established the citizen will not be required to apply for a permit. Until last year all US companies carrying Swedish citizens, pax, crew had to submit to Sweden an IEE "Form" which covered the ship operation. Quark, MEI, A&K/ESC all had submitted this on file with the Swedish government. *Fortunately Sweden has within their legislation that now individual citizens don't have to apply for a permit if the ship company has fulfilled their own national requirements.* This is an example of how a treaty party can flexible to minimize the paper work requirements of the operator.

##### **United Kingdom**

The United Kingdom permits companies and private expeditions. Their actual law as it relates to tourism is "an expedition is defined in the Act as any tour or other journey, whatever its purpose, made by one or more person. It is a British expedition if: 1) it was organized in the U.K. and if the place of final departure for Antarctica of the expedition was in the UK (ie Falkland Islands) of the extension of the Act to UK. A permit must be applied for and an EIA submitted. UK nationals are prohibited from activities in Antarctica *unless they have a permit, or written authorization from another contracting party.* Again, another example of a reciprocal agreement.

**Norway** requires that an EIA be produced anytime Norwegian Territory is entered. That means that technically if the Kapitan Khlebnikov lands passengers in Droning Maud Land, then an EIA will have to be submitted to the US because Quark as a US company operates the ship and to the Norwegians. It would be of particular interest to Quark that Norway and the US agree on the content of an IEE and that there would be reciprocity between countries. I'm not even going to bring up the issue of Sovereignty.

**Japan's** recent implementation of the Environmental Protocol states that: Japanese law is applied to Japanese Nationals and aliens residing in Japan or to Japanese nationals who are not currently living in Japan, Japanese employees engaging in Antarctic Activities or are involved in the supervision of Antarctic Activities in connection with the business. *Like the U.K, Japan will accept written authorization from a contracting party.*

**Netherlands:** a permit is required for an "organizer but does not require an individual citizen to have permit. An organizer is required to submit an EIA and if the EIA meets with the Netherlands approval, than a permit is issued. Currently a Dutch company owns one of the Russian Registered ships. The ship is operated by American and Australian companies.

**Finland:** Requires a permit for most activities in Antarctica including science and tourism. The law applies to Finnish citizens, Finnish legal person, vessels, foreign citizens permanently resident in Finland and vessels which take part in expeditions origination or arranged from Finland. Organizers are required to submit and EIA.

#### Conclusion

As you can see by the complexities of various legislation and the fact that Organizers or companies charter ships from one another its an international challenge. Although the Environmental Protocol serves to protect Antarctica it has created a paper work challenge for tour operators who are conscientious and want to make sure we are following the correct procedures.

We appreciate the flexibility that EPA has shown in working with U.S.-based tour operators thus far. As responsible tour operators with a long term interest in visiting and protecting Antarctica we look towards international cooperation, acceptance of multiple year IEE's, reciprocity between nations regarding the production and writing of EIA's. We commend EPA for extending the final rule for 2 years in light of the time period required to test the practical feasibility and how it relates to the International nature of Antarctic tourism.

Thank you or listening to our concerns.

Denise Landau  
Environmental Officer, Quark Expeditions  
Representative of Zegrahm Expeditions  
Representative of Clipper Cruise Line

**EPA's 2nd Scoping Meeting for EPA's Environmental Impact Statement  
for the final rule for environmental impact assessment of  
nongovernmental activities in Antarctica**

**July 14, 1998**

**Statement by Victoria Underwood**

Good afternoon and thank you for allowing me to speak before you today about EPA's Environmental Impact Statement for the final rule for environmental impact assessment of nongovernmental activities in Antarctica.

My name is Victoria Underwood and I am Antarctic Environmental Officer for Abercrombie & Kent and Explorer Shipping Corporation who own and operate the expedition ship, m/s Explorer. I am joined today by Charlie Scarlett, president of Explorer Shipping Corp.

My career in the travel industry dates back to 1982, however I have been involved with the Explorer since 1986 and have participated in over forty voyages to the Antarctic, primarily to the Peninsula region, but also to the Ross Sea. I am one of the co-authors of the IAATO visitor and tour operator guidelines that served as a foundation for Recommendation XVIII-1, adopted by the Antarctic Treaty Party system. For the last three years I have served on the Executive Committee of IAATO and recently attended the XXII Antarctic Treaty Consultative Meeting in Tromsø, Norway, along with other industry representatives.

For your background information, Explorer Shipping Corporation is an off-shore company chartered in the British Virgin Islands. Abercrombie & Kent, our parent company, was founded as a safari company in 1962 in Nairobi, Kenya and is today an international group of companies, with offices in 27 countries world-wide. A&K provides upscale adventures in more than 100 countries and on all seven continents. Headquartered in Oak Brook, Illinois, A&K also has offices in England, Egypt, Kenya, South Africa, Tanzania, Uganda, Zimbabwe, China, India, Japan, Thailand, Australia, New Zealand, Denmark, France, Germany, Italy and Spain. A&K employs more than 3,000 travel professionals around the world and has served more than 500,000 clients. My reasoning for mentioning the organization structure of our company, as have other speakers to the organization of their company's, is to point out the complexity of our industry.

The Explorer, registered in Monrovia, Liberia, is a small expedition cruise ship, carrying 96 passengers, and was the first ship purposely built for polar expedition cruising. She has operated in the Antarctic continuously since 1970 -- first as the Lindblad Explorer (from 1970 until 1984), then as the Society Explorer (from 1984 until 1992) and since

1992 as the Explorer, the flagship of A&K. It is a noteworthy achievement within this industry to see the same ship, operate with many of the same staff, offering essentially the same itineraries to the same number of travelers for twenty-eight years now.

Before addressing two specific issues, we would like to commend EPA on extending the Interim Final Rule through the 2000-2001 austral summer. This allows the tour operators to gain experience with the Rule itself and to ensure that the industry is more informed and better able to comment on EPA's environmental impact statement. We have been watching the development of the rule-making process with great interest and thank you for the opportunity to comment today.

In my comments, I would like to address two specific issues: 1) The need to streamline documentation, and 2) Support for one document for multiple operators covering multiple expeditions over several seasons. The reasoning behind this is as follows:

- Activities by the tour industry have been substantially similar from year-to-year. For example, the Explorer is about to begin her twenty-ninth season of operation in the Antarctic. Many of the officers, crew and expedition staff have been aboard for years. Our staff, in fact, average nine years of experience in the Antarctic. Nearly all of the places we visit are the same, and the same type of activity is being carried out. The same can also be said for many of the other ships presently being operated in the Antarctic by IAATO member companies. The World Discoverer, for example, operated by Society Expeditions, has been conducting voyages to Antarctica since 1977. The Bremen (formerly the Frontier Spirit), operated by Hapag-Lloyd, has been there since 1989. Several of the Russian ships operated by Mountain Travel / Sobek, Quark Expeditions, and Marine Expeditions, among others, have been employed since the early 1990s.
- This model of ship-based tourism, as developed by Lars-Eric Lindblad in the late 1960s, has been the same model that has been replicated by all of the Antarctic tour operators represented here today. The "Lindblad" model of responsible tourism has also been adopted by some of the larger ships, for example the Marco Polo. Lars-Eric Lindblad designed the Antarctic program for Orient Lines and led the voyages for the first few seasons. In addition, Orient Lines has hired some of the same expedition staff and crew who were trained by Lindblad himself or had worked for other companies operating under this same model.
- Many industry representatives have also been trained under the "Lindblad" model, including:

Werner Zehnder, who first started working for Lindblad as a chef aboard the Explorer in 1969 (aboard her maiden voyage) and later as an Expedition Leader for Society Expeditions for 7 years before becoming Sr. V.P. of Planning and Operations. In

1990, he and a group of expedition leaders and naturalists founded Zegrahm Expeditions. Werner continues to charter vessels from several of the IAATO member companies to operate his own voyages to the Antarctic.

Mike McDowell, who began working aboard the Explorer with Lindblad in 1977 as a staff assistant and Zodiac driver, and worked as an expedition leader until 1984. Since 1985, Mike has been one of the co-owners of Quark Expeditions and, along with Werner Zehnder, is considered to be one of the visionaries in the expedition tourism industry. Continuing in the Lindblad tradition of opening up new areas to tourism, Quark offered the first complete circumnavigation of Antarctica during the 1996-97 season, and has offered pioneering voyages to the Weddell Sea.

Baerbel Kraemer, head of ship operations and environmental affairs with Hapag Lloyd, responsible for the operations of the Hanseatic and Bremen, began her career as purser, cruise director and later as hotel manager aboard the Explorer, from 1978 to 1991. (Baerbel also has many years of experience working aboard the World Discoverer -- as do I.)

Nigel Sitwell worked aboard many voyages of the Lindblad Explorer in the 1970s and 1980s as a lecturer. Since then he has been employed as an Antarctic expedition leader or lecturer aboard the Illiria, Alta Tarasova (now the Clipper Adventurer), Ocean Princess, Khromov and Marco Polo.

Finally, Lindblad's son, Sven-Olaf Lindblad, president of Special Expeditions, will, continue the Lindblad tradition of trips to the Antarctic this season aboard the Caledonian Star. Special Expeditions has employed Tom Ritchie, a very experienced expedition leader who worked aboard the Explorer from 1977 - 1984 and Captain Leif Skog as master. Leif was affiliated with the Explorer for many years in the late 1970s and early 1980s and again for several years during the mid-1990s with A&K /Explorer Shipping Corp. He now oversees the marine operations for Special Expeditions.

These individuals are but a few of the many, many people who are still working in the Antarctic industry today, carrying on the tradition started in the 1960s by Lars-Eric Lindblad. All of this is very important not only for experience within the industry, but also for the cooperative and voluntary spirit that exists today between competing companies.

- To comply with regulations under the Interim Final Regulations for Environmental Impact Assessment of Nongovernmental Activities in Antarctica [40 CFR Par 8.2.], five U.S. based companies submitted environmental documentation regarding its planned activities during the 1997-1998 austral season to EPA for its review. Documentation included the following:

- a) transmittal letter;
- b) "Notice of Intent to Travel";
- c) consolidated document entitled "Initial Environmental Assessment: Ship Based Tourism by Five U.S. Organizers"

- The "Notice of Intent to Travel" is the same as the "Advance Notification of Intent to Travel" as submitted to the U.S. Department of State in fulfillment of obligations under Section 7 of the Antarctic Conservation Act implementing paragraph 5 of Article 7 of the Antarctic Treaty, and as further amplified by Recommendation XVIII-1 of the Antarctic Treaty System.

- Information submitted to the State Department by tour operators under "Advance Notification" includes the following, which is contained in Attachment A "Information to be Provided in Advance Notice" under ATCM Recommendation XVIII-1 "Guidance for Those Organising and Conducting Tourism and Non-governmental Activities in the Antarctic":

- a) Activities to be undertaken and purpose and intended itinerary, including the date of departure of and places to be visited in the Antarctic Treaty Area;
- b) Registered name and national registration of the vessel to be used;
- c) Name, nationality and contact details of organiser;
- d) Number and qualifications of crew and accompanying guides and expedition staff;
- e) Estimated number of visitors to be carried;
- f) Intended use of vessel (or aircraft if applicable);
- g) Number and type of other vessels, including small boats, to be used in the Antarctic Treaty Area;
- h) Information about insurance coverage;
- i) Details of equipment to be used, including for safety purposes, and arrangements for self-sufficiency;
- j) Other matters required by national laws

- As the "Advance Notification" mandated by the Antarctic Treaty system, especially as elaborated in Recommendation XVIII-1 includes much -- if not all -- of the information required in an IEE, IAATO's position is that the request for a Preliminary Environmental Review Memorandum (PERM) be omitted from the Final Rule as it duplicates the information already required by the Treaty. Secondly there is no need for an "update" as mentioned in the Information Collection Request (ICR) by EPA (section 3d) as this again duplicates notification.

This follows the line of thinking as echoed in the "Summary of Questions / Answers on the Interim Final Rule" (dated 08 July 1997, signed by Mr. William Dickerson, EPA),



whereby EPA has stated that..."some of the general requirements for environmental documentation are the same as for the information provided to the Department of State for notification purposes (see 40 CFR Part 8.4(a))."

- IAATO proposes that the Preliminary Environmental Review Memorandum, as a category, be deleted from the Final Rule as this is again a duplication of effort and defeats the goal of reducing paperwork. The filing of annual documentation to the Department of State under Treaty obligations and also to the EPA as a PERM is burdensome and unnecessary.
- Tour operators have the strongest interest in the development of a sound, workable system for conducting environmental assessments of nongovernmental activities in the Antarctic which are consistent with the requirements of the Protocol and the various national regulations which apply.
- As the old adage goes, "If it ain't broke, don't fix it." This reasoning is echoed in the following quote by Mr. Richard Sanderson, of EPA, in the "Summary of Questions / Answers on the Interim Final Rule," dated July 8th, 1997:

"The tour industry has had a long-standing tradition of voluntary compliance with the establishment of industry-established guidelines. Some of these guidelines are being adopted by the Antarctic Treaty Consultative Meeting on a trial basis and tour operators provide post-season reports to the National Science Foundation. EPA needs to factor these voluntary programs into its final rule; e.g. if the system now used is good and works, base the rule on its continued use."

- With this in mind, tour operators recognize that certain elements of this voluntary process are present in the Interim Final Rule, for example notification and post-trip verification reporting. Tour operators therefore strongly recommend that the EPA consider the voluntary process in developing the Final Rule.
- IAATO therefore does not see the need to automatically require that operators file an environmental assessment with EPA on an annual basis. In some cases, companies have been operating at the same level of activity aboard the same vessels with the same staff for decades and, arguably, could be considered an existing activity. IAATO sees no value in asking for resubmission of documentation annually for these operators. A provision should be made in the Final Rule for a multi-year submission based on a projection of future activities.
- EPA's mandate is to promulgate regulations "to provide for the environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under paragraph 5 of Article VII of the Treaty." Given the small number of U.S. private operators and the record of self-

regulation by the Antarctic tour industry, IAATO sees a broad interpretation of this mandate as misguided with potentially serious consequences to the Antarctic environment. An unnecessary burdensome, prescriptive rule could drive experienced Antarctic tour operators off-shore -- potentially to a country that is not a party to the Treaty -- or out of business and dismantle the current flexible and proven approach to limiting impacts.

Thank you once again for the opportunity to raise these issues.

**Clipper Cruise Line comments to EPA on July 14, 1998**

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Although this is our first season in the Antarctic with the *Clipper Adventurer*, Clipper Cruise Line operated in Antarctic for 3 years with the *World Discover* and we a similar level of activity and educational programming for our new ship.

Our preparations for the 1998/99 Antarctic season continued when we officially rejoined IAATO last summer. IAATO has been instrumental in sharing with Clipper the procedures and concerns we need to be aware of before our ship enters the Antarctic area.

We have provided advance notification to the U.S. Department of State, with copies to IAATO. Our ship is in compliance with all MARPOL, ISM and ISO requirements. We have hired qualified experienced staff and have put together a wealth of information to be sent to our passengers before they even board the vessel.

Like many other US tour operators operating cruises in Antarctica, we are small, US based and involved in many other areas of the globe besides Antarctica.

We can only ask that the EPA take its mandate to streamline documentation and obligations seriously and make the IEE process as efficient as possible. The purpose and scope of the Final Rule should be to report potential environmental impacts. An IEE that would cover several years would be most helpful. In addition, the advance notification we send to the State Department could serve as a yearly update to the IEE.

We are encouraged that we will be able to submit an IEE that has already been prepared by other US tour operators. IAATO members voluntarily work together on so many issues that cumbersome reports year after year seem costly, redundant and wasteful.

EPA Scoping Meeting of July 14, 1998.

**Special Expeditions Conservation and Management Experience in Relation to IAATO**  
**Presented by Tom Ritchie, Expedition Leader, Special Expeditions.**

Special Expeditions (SPEX) is proud to be the newest member of IAATO. In order to explain the significance of this new relationship, it is important first to establish a degree of credibility for those people not familiar with SPEX. The company was established in 1979, as a division of Lindblad Travel, and became independent the following year. Its president is Sven Olof Lindblad, son of the late Lars-Eric Lindblad who pioneered adventure travel. As expected, SPEX operates on the Lindblad Model of tourism. Our field personnel are largely composed of biologists, naturalists, and wildlife photographers who believe that you can turn people on to the wonders of nature, and they will care and participate in its preservation. The company has built a business on environmental education and client experience, and has earned a reputation in the conservation community as an innovative leader in environmentally responsible travel.

In 1993, SPEX received the ASTA/Smithsonian award for environmental achievement, primarily for the floating symposiums that we hosted to foster participatory management strategies for destinations like Baja California, Mexico, and Central America. The SPEX clientele, like that of other IAATO members, are generally well-educated, well-traveled people, many of whom already have a strong conservation ethic and support environmental protection through international NGOs. The staff of naturalist guides also have a strong environmental ethic, and environmental responsibility and stewardship is part of their interpretive framework. The company has a handbook of internal environmental policies for the field, including necessary briefing to passengers before landings, and how to conduct groups around seabird colonies, marine mammals, etc.

We design a conservation strategy by asking ourselves "How can we be a positive force in our destinations?" It is important to establish communication and credibility with the management or leadership of various destinations, and with the local conservation organizations. Sometimes this is difficult because management bodies do not exist, or there may be no interest in communicating with the private sector. One must also learn the conservation needs (management objectives) of the destination. Next, we examine our abilities, which vary greatly in each area and try to best match our abilities with the defined conservation needs of an area. In places where we have been able to integrate ourselves into the regional conservation community and management process, we have achieved things such as the initiation of local guide-training programs, whalewatching standards, and safety criteria, as well as the introduction of conservation organizations (NGOs) and internship programs into certain areas, and most importantly, establish forums for dialogue between management, NGOs, private sector, and local communities.

Among the case studies in the aforementioned management relationships is Baja California, Mexico. When we first operated in Baja in 1981, there was literally no management of an incredibly rich and fragile desert and marine environment. There was also no competition, which enabled us to operate freely. These conditions were perfect in that we had a very strong environmental ethic and communicated environmental messages to our passengers. As time went on and the Sea of Cortez and the Pacific gray whale lagoons became more popular, we realized that there had to be some kind of management, so we started to actively engage government authorities, NGOs, researchers, local communities, and tour operators into active dialogue about the importance of managing the area for

the future. Much of the success in this endeavor was achieved through the use of our ships as symposia platforms. Today, most major international conservation NGOs are actively working in Baja, and the Mexican government has established management policies and is now working with NGOs and the private sector on a long-term management strategy for the Sea of Cortez.

This mentality is likewise to be found among the members of IAATO. The fact that a like-minded body of environmentally concerned tour operators like IAATO exists is an incredible opportunity for anyone concerned with environmental protection to work with and through those people who are already engaged in environmental education and management of visitor impact and experience, and who have a vested interest in the long-term integrity of that environment.

It is an honor for Special Expeditions to be welcomed as a new member into the community of IAATO. The fact that a self-governing body of environmentally concerned tour operators is already in place is a monumental achievement and opportunity. Special Expeditions would encourage the EPA, and anyone trying to establish management or conservation policies in Antarctica, to appreciate the great opportunity in environmental protection that IAATO provides. The IAATO members are the kind of tour operators that you WANT to have in Antarctica. They serve the function of environmental education to visitors, and they provide an opportunity for any management body to communicate desired messages to visitors. IAATO members can provide an important monitoring function in that they are on site, and have a vested interest in the health and integrity of landing sites and flora and fauna. No management body is going to have the funds to provide the monitoring or presence that IAATO members can provide. IAATO members can provide any management body valuable feedback and realistic analysis of field conditions and visitor impacts that would be virtually impossible to understand otherwise.

We encourage the EPA to listen closely to the members of IAATO because they have more than simple experience in Antarctica, but have a soulful concern for the maintenance of its future. The mere fact that these tour operators organized together to set guidelines and standards for operation and establish a forum for communication should show the EPA that the ambassadors for environmental protection in Antarctica are already in place.



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American Littoral Society

Animal Welfare Institute

The Antarctica Project

The Atmosphere Alliance

Crocodon Society

International

Defenders of Wildlife

Earth Island Institute

EarthKind

Friends of the Earth - USA

Friends of Whales

Greenpeace - USA

The Humane Society of the

United States

International Fund for

Animal Welfare

Monitor Consortium

Monitor International

National Audubon Society

National Parks and

Conservation Association

National Wildlife Federation

Natural Resources Defense

Council

Ocean Alliance

Sierra Club

Sierra Club Legal Defense

Fund

The Wilderness Society

World Society for Protection

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### RE: COMMENTS ON EPA'S ENVIRONMENTAL IMPACT STATEMENT FOR THE FINAL RULE FOR EIA OF NONGOVERNMENTAL ACTIVITIES IN ANTARCTICA, PROMULGATED UNDER P.L. 104-227, THE ANTARCTIC SCIENCE, TOURISM, AND CONSERVATION ACT OF 1996

Dear Mr. Montgomery and Ms. Biggs:

Per the Federal Register notice of June 18, 1998 (supplemented by your letter of July 21 allowing a two-week delay in receiving our comments) The Antarctica Project, Greenpeace, Sierra Club, and World Wildlife Fund, on behalf of the Antarctic and Southern Ocean Coalition, welcome the opportunity to provide comments on issues to be addressed in the EIS for the Final Rule for environmental impact assessment of nongovernmental activities in Antarctica. These comments supplement the comments we sent in July 1997, in response to your request for comments following the first public scoping meeting on the Final Rule. We request that you refer to both sets of comments when drafting the Final Rule.

The Protocol on Environmental Protection to the Antarctic Treaty is designed to ensure that the protection of the Antarctic environment is the paramount consideration when making decisions about whether and how an activity should proceed. Activities must be planned so as to limit adverse impacts on the environment and on the basis of prior assessment of possible impacts. In order to faithfully implement the Protocol, impacts identified by the EIA process should be mitigated to the greatest extent possible, and activities which threaten to impact Antarctica's environment must be modified to minimize the possibility of this occurring.

To ensure that the EIA process, within the U.S., for tourism and non-governmental activities faithfully implements the Protocol, the following issues must be considered in promulgation of the Final Rule:

**1. Article 3 Compliance:** Compliance with the Environmental Principles of Article 3 must be demonstrated in EIA (as required by this Article), and should be incorporated into the Final Rule as a requirement. The principles are expected to guide and shape environmental planning and decision-making for all activities in Antarctica, regardless of whether or not they are covered explicitly by the Annexes. The incorporation of the Article 3 principles into the review criteria will allow an understanding of the extent to which the activity will conform with Article 3.

Article 3 requires activities to be "planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the Antarctic environment," taking full account of the cumulative impacts of the activity, whether the activity will detrimentally affect any other activity in the area, whether technology and procedures are available to provide for environmentally safe operations, whether monitoring can be put in place to provide early detection of potential impact, and whether there exists the capacity to respond promptly to accidents. The Final Rule must request that sufficient information be included in the EIA to allow an informed judgment to be made about a proposed activity. If insufficient information is included, then the precautionary principle must apply.

**2. Article 3 requires that activities be modified, suspended or canceled if they result or threaten to result in impacts upon the environment or associated ecosystems inconsistent with Article 3.** The Final Rule should provide the authority to prevent an activity from proceeding if unacceptable impacts are identified, or require modification of the activity. Since the Protocol and its Annexes list prohibited activities, and environmental impacts that are to be avoided, in most cases preventing an activity from proceeding should not be an issue. However, there may be occasion when a permitted activity threatens to result in unacceptable impact, and there must be flexibility to require the modification, suspension or cancellation of the activity.

**3. Definition of Operator:** It is our firm view that the Final Rule must apply to all operators doing business within the United States, regardless of whether or not they are incorporated within the United States. The Interim Final Rule currently applies only to operators of "nongovernmental expeditions [to and within Antarctica] organized in or proceeding from" the United States. s 8.2(b). An "operator" is defined as "any person or persons [subject to the jurisdiction of the United States] organizing a nongovernmental expedition to or within Antarctica." s 8.3.

It has been suggested that the Final Rule should be applied only to tour operators incorporated in the United States. Such an interpretation would be directly contrary to the language of the Antarctic Science, Tourism, and Conservation Act of 1996 (ASTCA). Please refer to our comments of last year for our detailed analysis of this issue.

Applying the Final Rule to all organizers who do business in the U.S. is potentially the single most important way to ensure that U.S. standards are applied to all U.S. citizens. Without being able to reach non-U.S. based operators who do business in the U.S., the possibility exists that an operator will "shop around" and base themselves in a country to escape compliance with U.S. requirements. This is a concern if that country has standards which are less stringent than U.S. standards and which may not therefore fully implement the Protocol, or if that country is not a signatory to the Protocol, and so imposes no obligations upon an operator. It is our belief that

operators will not be willing to forego the lucrative U.S. market, and will be less likely to relocate solely to evade U.S. obligations.

Applying the Final Rule in this way will have an additional benefit: given the nature of the tourist industry where companies subcontract tours and boats from each other, it will remove the question of who is the organizer, and is that company required to comply with U.S. law. In the case of Antarctic tourism, the answer will always be yes, and it will be up to the tour operators to decide amongst themselves who will fulfill this obligation.

**4. Streamlining documentation -- acceptability of foreign EIAs:** We are supportive of minimizing the paperwork burden on tour operators; however, we believe it would be risky to automatically assume that satisfactory completion of EIA for another country would be sufficient to meet the EIA requirements of the Final Rule. Thus, operators should be encouraged to provide copies of EIA submissions made to other governments (with translations, if need be) and incorporate them by reference.

It is worth noting, however, that most other countries have the ability to require the modification, suspension or cancellation of an activity if it threatens to impact the environment. This means that completion of an EIA for another country does not necessarily imply the acceptance of that activity. Most countries also require a permit prior to the onset of any activities in the Antarctic. Therefore, completion of these documents for other countries should not prejudice consideration by EPA.

**5. Streamlining documentation -- Multi-year EIA:** As noted above, we are supportive of minimizing the paperwork burden on tour operators, and support the completion of multi-year EIAs, on the following conditions:

- (i) a supplement is filed which reports on minor changes;
- (ii) a new EIA is produced if there is a significant change in the activity (some predetermined percentage increase or decrease in e.g., passenger number, could trigger this; and
- (iii) a CEE is completed if the number of passengers in any given year is predicted to meet or exceed 25% of the 1997/98 level.

The Protocol Article 8 requires that the EIA procedures apply to any change in an activity, whether the change arises from an increase or decrease in the intensity of the activity, from the addition of an activity, the decommissioning of a facility, etc. Thus, if there is a significant increase or decrease in the number of tourists planning on traveling to the Antarctic, a new EIA must be prepared. Since the Protocol was signed in 1991, the number of passengers traveling to the Antarctic has increased by 50%. In spite of statements that the number of passengers is expected to remain constant, the tour operators are predicting an additional 40-50% increase in the number of tourists in less than half that time -- by the 2000/2001 Antarctic season in three years. This increase follows the 50% increase in the number of passengers since the Protocol was signed in 1991. If this increase holds true, a case could be made that a CEE would be the appropriate level of impact assessment for this period.

**5. Operator's responsibilities:** The Final Rule must be explicit in detailing an operator's

responsibility with respect to ensuring that the boat used to transport passengers to, from or within Antarctica is able to comply with the Protocol's standards. The registry of a boat does not determine whether or not it must be in compliance with the Protocol and with U.S. implementing regulations. The nationality of the operator (and hopefully whether an operator does business within the U.S.) determines whether the operator must comply with U.S. regulations. The boat is just one part of the expedition.

#### Conclusion

The Antarctic Environmental Protocol is a landmark agreement designed to provide comprehensive protection of the world's last great wilderness. Faithful implementation of the Protocol will ensure that the values of Antarctica, as envisioned by the original signers of the Antarctic Treaty, will be strengthened and preserved. Therefore, regulations designed to implement the Protocol's provisions must ensure that the spirit as well as the substance of the Protocol are realized in the conduct of all activities. We hope that you will consider ASOC's comments of July 30, 1997 along with these comments when preparing the Final Rule for EIA for nongovernmental activities. We stand ready to assist EPA and other government agencies in their preparation of the Final Rule.

prepared by  
Beth Clark, Director  
The Antarctica Project  
August 14, 1998

July 15, 1998

To: Darrel Schoeling  
From: Citizen Paul C. Dalrymple  
Subject: Antarctic Tourism - Environment

1. Thoughts passed through my head yesterday afternoon at the Hearings at EPA -- thoughts created mostly from being in Antarctica three of the last four austral summers with Quark and MEI, plus my awareness of the Antarctic Protocol.
2. As Beth Clark said near the end of the afternoon, I have not heard anything new which I had not heard before, and it seems that at the first meeting since the U.S. ratification of the Antarctic Protocol there might have been some new innovative thinking/proposals.
3. Everyone seemed to talk about the Lindblad Model. I found this distressing, as we are in a new era. Lindblad was in and out of the Antarctic arena before anyone ever thought of preserving the environment through the Protocol. And what was sacred about Lindblad? Sure he was very good, but perhaps a bit lucky, in what he did in Antarctica. He was also plagued by more than a few disasters with his ships which had to be rescued. And some of his staff people did some weird things which would never be tolerated today, such as capturing a penguin and bringing it back to the ship for an on-board lecture. Lindblad Model, upon close inspection, is probably outdated in today's mode of the Antarctic Protocol.
4. Instead of the Lindblad Model, why not the Naveen Model, something responsive to today's activities, where specific guidelines have been established for treating the fauna, flora, and wildlife of Antarctica? His Site Guide is the greatest thing to ever happen for the Antarctic environment, although it needs to be revised and updated, even though it is only a year old. Naveen is much more responsive to the environment than Lindblad was.
5. I think what is needed now is for NSF - EPA - USCG to produce a new film explaining the concept of the Antarctic Protocol, how travelers and scientists should act/behave while in Antarctica, what is acceptable/not acceptable, and what penalties confront those of us who do not conform. With close to 10,000 tourists alone, a film is the best way to get the new message through to the people. As you know, there are expedition leaders and there are expedition leaders. A good one, like Dennis Mense, has a person with a clipboard checking off people at the door to make sure they hear the mandatory films provided by NSF. Others, no names here, regard it as optional. But my feeling is that a new film should be made on the newly enacted legislation, and make it MANDATORY for all passengers to see on shipboard. I also feel strongly that Naveen's Site Guide should be put into the hands of all travelers.
6. As you well know, over 99% of the tourists are excellent ashore. Based on my experience, the biggest problem is a nationality problem. No one yesterday wanted to point fingers, but let's be honest with ourselves; the Germans are a hard group to control. I know one megabuck frequent

traveler to Antarctica who will just not go on an Antarctic ship if she finds out there are going to be many Germans aboard. It was a German tourist several years ago who encroached on an elephant seal on Hannah Point, Livingston Island, and he/she started moving and fell down onto the beach, 80-100 feet below. Maybe the film I'm suggesting should be in English, German, Japanese. I have been on at least five all-Japanese cruises, and have never found them to be any problem, as they come with an entourage of leaders who keep them under control. They do tend to climb every hill they see, and occasionally some of the hills are off limits. But how do you handle a German without a fixed bayonet?

7. One thing I wonder about is whether we should have separate guidelines for different species of penguins, or separate guidelines for different landing sites. Take the cool, calm, and collected gentoos. It's impossible to visit the British base at Port Lockroy, and go to their building without walking within a foot of the birds breeding right on the paths or steps into the building, yet none exhibit any outward anxiety as people walk by. For the past two summers there has been a macaroni right off the landing beach at Hannah Point, and since this is the only site where passengers will normally see a macaroni, everyone wants to stretch the criteria for getting closer. You can tell the passengers on ship what to do, but when they get a macaroni in their lens finder, they seem to suffer Alzheimer's. But the bottom line here is that when NSF put ice cops on different ships several years ago, the answers coming back were that there were no problems with tourists.
8. One thing which I feel IAATO could do would be to prepare a guideline of operations for expedition leaders. They come from all walks of life, generally not being scientists or naturalists, but most are very good in what they do. Some expedition leaders never come near the lecture hall; some are always there. I know one learned expedition leader who has to have the last word on every lecture, even when a Polly Penhale is aboard.
9. As a person who is in contact with a lot of Antarcticans, I think IAATO should consider making a master listing of Antarcticans who would like to lecture. I was on one cruise where three lecturers were in Antarctica for their very first time. Not good!
10. If these meetings, such as yesterday's, are to be an annual affair, I think it might be interesting to have an input from some of the travelers themselves. There are many, many extremely environmental-conscious travelers aboard, some of whom are naturalists who publish in the open literature. From my last trip, I could name three who would welcome the opportunity to submit written statements on their thoughts. How many times have we now heard Victoria Underwood say she has been on forty cruises? A new viewpoint from a naturalist might be more interesting.

*Paul C. Dalrymple*  
July 15, 1998